WASHINGTON
LEGISLATIVE OFFICE

July 27, 2006

The Honorable Peter Hoekstra, Chairman
The Honorable Jane Harman, Ranking Member
House Permanent Select Committee on Intelligence
United States House of Representatives
Washington, DC 20530

Re. Opposition to H.R. 5825, Reducing the Protections for US Persons under the Foreign Intelligence Surveillance Act

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TREASURER

Dear Congressman Hoekstra and Congresswoman Harman:

On behalf of the American Civil Liberties Union, and its hundreds of thousands of activists, members and fifty-three affiliates nationwide, we write to share with you our views on H.R. 5825, a bill that is intended to "update" the Foreign Intelligence Surveillance Act (FISA) but which basically endorses the wish list of the National Security Agency (NSA) to the detriment of Americans' rights. We strongly oppose the expanded surveillance powers proposed by this bill, which some have called the "NSA Wish List" bill, because it grants unchecked surveillance power to the agency. We ask that this letter be submitted for the record in the hearing on this bill and related proposals to weaken the civil liberties protections against warrantless surveillance of Americans.

We are particularly disappointed in the bill, given the independent, non-partisan approach the lead sponsor of this legislation had taken earlier this year when the revelations of warrantless surveillance of Americans first arose. It appears that the well-intentioned desire to restore this Committee's proper role as one of the important checks on national security surveillance in this country has somehow been joined by an opportunistic effort by the Administration to re-write FISA to reduce the rights of people in the U.S.

The result, unfortunately, is that the bill seems to endorse the President's extremely controversial claim that he need not abide by FISA and he should be given free rein to search Americans' communications or homes for extended periods without check. It is fair to say the bill authorizes far more than the President has admitted. We hope the sponsors of this bill will reconsider this approach and instead restore the rule of law by embracing the common sense approach charted by the Ranking Member.

We have two overarching concerns about H.R. 5825, which embodies scores of changes to FISA, changes we believe would result in legalizing a range of unauthorized surveillance programs without Congress being fully informed

about what it is approving. First, the bill allows warrantless surveillance of all international calls and e-mails of Americans and businesses in the U.S., without any evidence that they are conspiring with al Qaeda or other foreign terrorist organizations. Second, because the bill pre-approves warrantless searches whenever U.S. territory is attacked, it in effect allows foreign terrorists to decide when fundamental constitutional rights are to be suspended.

Warrantless Wiretaps of Americans' International Calls and Emails. It has often been said that the devil is in the details and in this case it is in the definitions. One of the most profound changes in the law wrought by this bill is that it would redefine "electronic surveillance" so that it does not include "electronic surveillance" of Americans' international calls and e-mails. This across-the-board change would allow the monitoring of any and every phone call made to or from an American resident or citizen to friends, family members or businesses abroad. The same exemption for warrantless surveillance would apply to e-mail communications-- if any person in the electronic communication were abroad, the contents of the e-mail would have no privacy protections against U.S. government monitoring. This change is made worse by a provision that states that Americans' communications are only protected if the NSA "reasonably believes" all the senders and recipients are in the U.S.; if the NSA does not so believe, it need not seek a warrant.

These changes are unwarranted and unconstitutional. The bill would authorize the government to monitor calls and emails to or from Americans that are international, even if there is no evidence the person is conspiring with al Qaeda or doing anything wrong. (If an American were conspiring with an agent of al Qaeda, the government could get a warrant from the Foreign Intelligence Surveillance Court.) The bill's authorization of the warrantless surveillance of the communications of millions of innocent Americans is totally unjustified and would fundamentally alter the privacy of people in this free society. In the guise of "modernizing" FISA, the bill would destroy it and the rights it was written to protect.

Allowing warrantless monitoring of international calls and emails would turn back the clock to when the NSA, through Operation Shamrock, was obtaining the records of every single international telegraph sent by American residents and businesses. The Church-Pike Committee conducted extensive investigations into that secret operation's massive invasion of Americans' privacy and, quite properly, sought to end such unwarranted intrusions in the name of national security. That Committee was not afraid to hold public hearings and conduct investigations into the shocking revelations that the NSA was monitoring international telegrams, the precursor to e-mail, when a whistleblower revealed it. *See* "National Security Agency Reported Eavesdropping on Most Private Cables," *New York Times*, Aug. 1, 1975. That Committee's thorough, non-partisan investigation produced the following details and documents about what was really going on, including:

- when the surveillance of Americans' communications began (through the disclosure of letters to and from participating companies);

- which companies initially refused but later cooperated and how such cooperation was obtained (there were claims that ITT would be the "only non-cooperative company on the project");
- how the government dealt with fears by the companies that the project was illegal or the FCC would learn they were violating regulations;
- that the Attorney General gave assurances that companies would be protected against any consequences;
- that responsible Administration officials had been unaware of the program for most of its existence;
- that the program was extracting information on innocent Americans;
- whether NSA employees and other government employees were also monitored by the NSA (they were);
- how many files were created by the NSA on American citizens;
- whether the files on Americans were focused on foreign threats or included "many prominent Americans in business, the performing arts, and politics, including members of Congress" (they did).

See Church Committee Report, Book III pp. 733-783. Ultimately, the predecessor to this Committee learned that millions of Americans' telegrams had been monitored by the NSA, with over a 100,000 analyzed each month.

Given the recalcitrance of the Administration, including its refusal to disclose even how much money is being spent on the unauthorized surveillance of people in this country, it would be difficult to believe this Committee has been given answers to these and related questions along with the documents needed to verify the Administration's claims. Yet, this Committee is rushing to consider legislation that would undo the lengthy deliberations of Congress to prevent such warrantless surveillance from ever happening again. We think it fair to question the wisdom of altering the protections for Americans at this juncture and in the face of such intransigence by the Administration.

There is no doubt the country faces significant national security challenges in the aftermath of the attacks of September 11th, but it is also fair to say that our nation–while abiding by FISA–faced and triumphed over foes at least as powerful as those who launched the September 11th attacks. When FISA was passed, America was in the deep winter of the Cold War facing a threat of nuclear annihilation with Soviet nuclear warheads aimed at every major American city. And, it should go without saying that even in times of war the President is not a law unto himself—FISA's rules and criminal penalties have not been repealed, the Fourth Amendment has not been suspended, and the Constitution with its bedrock principle of checks and balances was not destroyed on September 11th. We must not allow our legacy of liberty to be rendered moot. Nothing less than the rule of law is at stake.

Expanding Warrantless Searches of Americans if the US Were Attacked. The bill would allow Americans' homes and businesses to be searched and domestic conversations to be wiretapped without any judicial check for extended periods. The bill would replace FISA's rules that say the President must get a warrant except for the first two weeks after a declaration of war, and instead would add provisions that allow warrantless physical searches

and electronic surveillance of Americans in this country without any judicial check for two months in the case of a "armed attack."

And if there were a "terrorist attack" on any US territory, the bill would allow the President to monitor any Americans' conversations he chooses, without any judicial check, in 45-day increments. It would not matter whether the incident were small or far away—at a disco thousands of miles away in Guam or an embassy in Africa or through a lone gunman in the US—the President would be able to authorize the government to listen to the conversations of anyone in this country he thinks might be communicating with terrorists or who might have foreign intelligence information, without any judicial check at all. This "authorization" means Americans have rights only at the discretion of terrorists. Under this bill, their actions *automatically* trigger a statutory grant of extraordinary power to the Executive Branch to conduct secret searches, repeatedly, over a long period, and without judicial review. That is simply wrong for our country.

The bill requires blind trust that the President and future presidents will never misuse such a grant of power to secretly wiretap anyone they want. The bill also takes Congress out of the equation by not requiring a declaration of war nor even an authorization for the use of military force under the War Powers Act. The Constitution, however, does not give Congress the power to suspend the Fourth Amendment or delegate to the President such a "right" for unlimited 45-day period of warrantless surveillance. Congress cannot waive Americans' individual rights, let alone waive them in advance.

The bill is not saved by the provision that at the end of 90 days, the President would have the "option" of seeking a court order to continue to wiretap a US person he deems to be communicating with a terrorist. Under the bill, warrants are plainly not a mandatory check. The bill allows the President to opt out of the warrant requirement by informing each member of the Intelligence Committees whom he is still spying on and why. Secret notice to Congress is no substitute for preventing warrantless surveillance of Americans. And the Committee does not perform a judicial function in adjudicating—along with granting or denying—individual surveillance of which it is informed.

These so-called emergency provisions of the bill grant vague and wide-reaching powers to the President. The war on terror is by its nature undefined and indefinite, and the President would be cast as the sole arbiter of this renewable warrantless surveillance period for decades to come. There is no retroactive check on the President to ensure he did not abuse this power and no way, other than the power of the purse, to stop the emergency the President declared from being extended repeatedly. Current law much more reasonably allows a one-time 15-day exemption in addition to three-day emergency wiretaps that are then subject to judicial check, unlike the searches allowed by this bill.

This unprecedented power transfer to the President comes when the Administration has shown itself unwilling to operate within the laws as written and willing to break the law whenever it finds the rules inconvenient.

In front of the Senate Judiciary Committee last week, Attorney General Gonzales offered a novel legal argument: that no act by the President is illegal until the Supreme Court says it is. *Department of Justice Oversight Before the Senate Judiciary Committee*, 109th Cong. (July 18, 2006). This presumptuous claim of legality in the face of the plain language of statutes and decades of precedent is troubling in and of itself. If Congress now rewards the President with broad latitude to spy on Americans without a warrant, for any kind of attack and for as long as he wishes, our liberties may never recover.

In addition to these overarching concerns, we have further concerns about the substantial changes to the definitions of FISA that we would like to discuss with the Committee. The bill includes substantial revisions of 50 USC § 1802, allowing the government to sweep up Americans' conversations through a dragnet as long as the net is directed at the communications of foreign countries. In cities like Washington, DC, New York, Miami, Chicago, or San Francisco, for example, where local trunk lines include calls from foreign embassies, Americans' conversations could also be accessed. Current law requires no warrant if the target is a foreign embassy here and there is no substantial likelihood of intercepting Americans' conversations through the surveillance used on these foreign government communications. The bill would inexplicably delete that important protection while also changing the law to allow more American conversations to be kept, even though "unintentionally acquired." The bill would also expand warrantless access by allowing the Attorney General to obtain "stored communications" from landlords and other persons without a court order and compensate them for the secret cooperation. It is unclear how far into Americans' homes and businesses, where computers and telephones store emails and voicemails, the Attorney General could reach with these changes.

Among our other concerns is the fact that the bill omits from its definition of a "surveillance device" Carnivore-like devices that extract or analyze data. With this omission, the bill exempts data mining – allowing secret agents of the government to comb through millions of innocent Americans' communications or other data for patterns – from the court order requirements. We are very concerned that this change could be interpreted to allow the government to operate this extensive program to track every call Americans make and receive without a court ever considering its legality, much less its effectiveness. Congress should not be authorizing the data mining of the records of innocent Americans. Our strong concerns about data mining are detailed in our letter to the Committee dated July 17, 2006, which we would ask to be included in the record. That letter also reiterates our endorsement of other legislation on these issues: the Harman-Conyers and Flake-Schiff bills that help restore the rule of law.

We ask the Committee to reaffirm its non-partisan roots and resist political pressure to go along with the White House, which has kept members of this Committee in the dark on matters clearly within its jurisdiction and responsibility. During extensive hearings on the Patriot Act's changes to FISA (at http://www.fas.org/sgp/crs/intel/m071906.pdf), the Administration did not claim it needed additional authorities like those this bill would

authorize. We ask the Committee to forbear and hold additional hearings in order to get a better grasp on the extent to which the Administration has engaged in unlawful surveillance of American residents.

We also believe the bill should not move forward on the heels of Attorney General Alberto Gonzales' revelation that the President is blocking a Department of Justice investigation regarding the illegal NSA spying program. Rather than fire the investigators—as President Nixon did during the Saturday Night Massacre—President Bush denied them clearance to investigate. These are simply different routes to the same result: White House interference with a legitimate investigation by the Justice Department. The Committee should be investigating that obstruction and politicization.

Further, the bill fails to take into account recent judicial decisions that reiterated limits on presidential power. In a decision regarding a challenge to the NSA's warrantless surveillance, a federal court held last week that the Constitution protects the privacy of Americans' telephone conversations. *See Hepting v. AT&T Corp.*, No. C-06-672 VRW (D. Calif. July 20, 2006). As the court noted, the NSA's dragnet-style programs monitoring Americans' telephone calls "violate the constitutional rights clearly established in *Keith.*" *Hepting* at 68 (citing *United States v. United States District Court*, 407 U.S. 297 (1972)). This bill also ignores the crux of the *Hamdan* decision.

Already, the Administration has shown its disregard for the civil liberties of ordinary Americans by ordering spying on their communications without the judicial check required by law to protect individual rights. Already, the Administration has shown its willingness to act outside the law. Americans' privacy rights and Fourth Amendment protections are too valuable and too vulnerable for Congress to grant such expanded powers to the Executive Branch. Some might argue that this bill is no blank check, rather it is a check written to the Administration in the amount it wants, diminishing privacy rights and the checks and balances that protect them.

Accordingly, we urge the Committee to investigate thoroughly the ongoing illegal surveillance programs currently being conducted by the Administration, and we hope the Committee will reaffirm its vital role as a check on the Executive. We respectfully ask the members of the Committee to reject H.R. 5825 as a major setback for the civil liberties of all Americans.

Thank you for considering our views.

Sincerely,

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Director, Washington Legislative Office

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